Editor's note: Appealed -- aff'd, Civ.No. 89-1223 (WD Penn. Jan. 19, 1993)

WILLOWBROOK MINING CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

PENNSYLVANIA COAL MINING ASSOCIATION, ET AL. (Amici curiae)

IBLA 87-487 Decided April 28, 1989

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying appellant's application for review of Notice of Violation No. 85-121-270-02.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Generally--Surface Mining Control and Reclamation Act of 1977: Roads: Construction

   The construction of a private way for the sole purpose of moving a dragline from a site at which it had been used for surface mining to another site where it would again be used for surface mining is construction incidental to surface mining, and is therefore a surface mining activity which requires a permit under SMCRA.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

   OSMRE is authorized to issue a 10-day notice when it has reason to believe that a person is conducting surface mining activity causing a surface disturbance in an area not covered by a permit in violation of the requirements of SMCRA. When, in response to this notice, the state agency advises OSMRE that it was taking no action because it does not consider the activity to be surface mining or a related activity,

and thus a permit is not required, and the interpretation of the statute advanced by the state is contrary to both the intent of SMCRA and a reasonable interpretation of state law, it is proper for OSMRE to order a Federal inspection. When, on the basis of this Federal inspection, OSMRE determines that the activity is in violation of any requirement of SMCRA, OSMRE may issue a notice of violation to the operator, fixing a reasonable time for abatement.

3. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: Generally

A state with an approved program is responsible for carrying out the provisions of SMCRA. This charge will obviously be unfulfilled if OSMRE allows the state to maintain a position contrary to that Act. When the State has clearly demonstrated that it does not intend to enforce its program, and the course of action adopted by the state renders it impossible for an operator to legally undertake operations which would otherwise be permitted, OSMRE is required to institute proceedings pursuant to the provisions of 30 U.S.C. | 1271(b) (1982).

APPEARANCES: Stephen C. Braverman, Esq., Philadelphia, Pennsylvania, for Willowbrook Mining Company; William R. Stanley, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Dean K. Hunt, Lexington, Kentucky, for the Pennsylvania Coal Mining Association et al., amici curiae.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Willowbrook Mining Company (Willowbrook) has appealed from an April 22, 1987, decision by Administrative Law Judge Joseph E. McGuire denying Willowbrook's application for review of Notice of Violation (NOV) No. 85-121-270-02.

There is no material dispute regarding the facts leading to the issuance of NOV No. 85-121-270-02. Willowbrook is in the business of mining coal, and held two surface mining permits issued by the Commonwealth of Pennsylvania which are material to this decision. The first was for the Worth Site or Jones Mine (permit No. 3070BSM6), issued July 30, 1970. The second was for the Sandy Lake Site or Edwards Mine (permit No. 438010), which was issued on May 1, 1985.

About the time mining was being completed at the Jones Mine, Willowbrook commenced preparation of the Edwards Mine for surface mining operations. In the course of winding down operations at the Jones Mine

and in contemplation of mining the Edwards Mine, Willowbrook prepared to walk an 875-ton dragline in use at the Jones Mine to the Edwards Mine.

To facilitate moving the dragline to the Edwards Mine, Willowbrook sought rights-of-way from seven landowners between the two mines, which are approximately 1-1/4 miles apart. After lengthy negotiations, in September and October 1984, Willowbrook entered into agreements with the landowners to permit moving the dragline across their property (Tr. 181-90, Applicant's Exh. 3). One or more of the agreements provided that the contemplated road would remain, but would be narrowed to 50 feet in width.

On one previous occasion, in 1983, Willowbrook had moved a dragline between permitted properties. At that time Willowbrook approached the Pennsylvania Department of Environmental Resources (DER) to determine what permits were necessary to do so, and was advised that a surface mining permit was not required (Tr. 208). DER is the Commonwealth agency responsible for overseeing surface mining activities in Pennsylvania. 1/

DER's action in 1983 appears to be consistent with permitting action taken with respect to other operators when they sought permits for construction of similar roads. Karl K. Sheaffer, Chief of the Permitting Division, DER, testified that draglines had been moved on several occasions in the past, and no surface mining permits were deemed required or issued by the Commonwealth of Pennsylvania (Tr. 97).

At about the same time it was negotiating for the rights-of-way, Willowbrook applied for the nonsurface mining permits it believed to be necessary for the construction of the road, based upon its prior experience. On November 14, 1984, stream-crossing permit No. E43-103 was issued by DER, Bureau of Dams and Waterways Management. Lake Township and the Pennsylvania Department of Transportation also approved construction of the road.

Between February 1 and April 20, 1985, Willowbrook constructed a road along the rights-of-way. According to Willowbrook, the road was constructed for the sole purpose of moving the dragline from one site to the other, and it never intended to use the road for hauling coal. 2/ As constructed, the road was from 80- to 200-feet wide, but was deemed by Willowbrook to be no wider than necessary to move the dragline.

During a routine oversight inspection of the Jones Mine, Earl F. Ropp, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSMRE), observed the road construction and determined that somewhere between 4,000 and 4,800 linear feet of the roadway was on land which had not been permitted or bonded. On April 17, 1985, OSMRE issued Ten-Day Notice No. 85-121-270-2-TV1 (the 10-day notice) to DER. The 10-day notice stated OSMRE's belief that Willowbrook had violated 25 Pa. Admin. Code

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1/ See 30 CFR Part 983.

2/ It was the intent of Willowbrook and the right-of-way grantors to preserve the road for use by the landowners after the dragline had been moved, but to reduce its width to 50 feet (Applicant's Exh. 3).

| 86.143 by building the road without having first obtained a surface min-ing permit and bond.

On May 3, 1985, DER responded to the 10-day Notice, advising OSMRE that no action would be taken because DER did not consider construction of a road to move a dragline from one mine drainage permit site to another to be surface mining or a related activity, and thus it was not required that the road be permitted or bonded by DER. The letter noted that Willowbrook was required to obtain a permit from the Township, the Pennsylvania Department of Transportation, and DER Department of Dams and Waterways (Respondent's Exh. 4). As previously noted, Willowbrook had obtained the permits set forth in DER's May 3 letter. Based on the statements made in that letter, Willowbrook decided to commence moving the dragline on May 5, 1985. 3/

On May 6, 1985, the Area Manager, OSMRE, advised DER that its response to the 10-day notice was "inappropriate." He advised DER of his determination that

> [s]ection 87.1 (Definitions) of the Pennsylvania Code, states surface mining activities "shall include . . . private ways and roads, appurtenant to any such areas." This stipulates that the subject road is a mining activity and must be permitted, as per 25 PA Code Ch. 86.143(b).

He concluded that a Federal inspection should be conducted.

Ropp conducted an onsite inspection on May 10, 1985. During this inspection he walked the roadway and took measurements and photographs. Following his inspection he issued and served NOV No. 85-121-270-01. On May 23, 1985, Ropp conducted an additional inspection of the site. At that time NOV No. 85-121-270-01 was vacated "to more accurately describe the violation and the provisions of the regulations or Act violated" (Respondent's Exh. 14). At the same time Ropp issued NOV No. 85-121-270-02 which stated that "[Willowbrook] has conducted surface mining activities without first obtaining from [DER] a permit authorizing mining" (Respondent's Exh. 16). The provisions cited as having been violated were 30 U.S.C. | 1252 (1982), 30 CFR 773.11, section 4(a) of PASMCRA, 4/ 25 PA Code 86.11, and 25 PA Code 86.143(b). The NOV applied to "the newly constructed access and/or haul road located between the northeastern corner of mine drainage permit 3070BSM6 and Township Route 613, and beyond where fill material from the permit has been placed" (Respondent's Exh. 16).

The NOV called for cessation of all activities on unpermitted, unbonded, disturbed surface acreage except for reclamation activities.
In addition, two alternative abatement measures were stated: (1) appli-cation for and receipt from DER of a permit authorizing surface mining

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3/ The dragline reached the Edwards Mine about May 8, 1985.
4/ The Pennsylvania Surface Mining Conservation and Reclamation Act (52 P.S. || 1396.1 - 1396.25).

activity on the disturbed area; or (2) restoration of the disturbed and unpermitted area by meeting the performance standards of 25 PA Code 87.166. Willowbrook was given until 10 a.m. August 8, 1985, to complete either abatement requirement (Respondent's Exh. 16).

On June 14, 1985, Willowbrook filed an application for review of NOV No. 85-121-270-02 and stated two bases for the application. The first was that OSMRE lacked jurisdiction to conduct an inspection or issue the NOV because DER had shown good cause for its failure to take the corrective action sought by OSMRE. Willowbrook contended that moving the dragline from one permitted area to another was not a surface coal mining activity (as that activity is defined by Pennsylvania law), it had obtained all necessary permits for the construction of the road used to move the dragline, and thus it was not in violation of Pennsylvania law or the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. || 1201, 1328 (1982). The second basis for the application was that it would be futile for Willowbrook to apply for a surface mining permit for such activity, as a permit would be denied. Addressing the abatement measures called for in the NOV, Willowbrook contended that OSMRE's demand that it remove the road if no permit is obtained would violate contractual relationships between Willowbrook and the right-of-way grantees.

Willowbrook representatives discussed the issue with DER representatives on several occasions between the date OSMRE had issued its 10-day notice and the date of the hearing. During each of these conversations DER advised Willowbrook that DER did not consider a surface mining permit to be necessary for construction of Willowbrook's road (Tr. 212-15, Applicant's Exh. 5). On August 20, 1985, Willowbrook filed a permit amendment application for permit No. 438010 with DER to include the road in that surface mining permit, an abatement procedure called for in the NOV. At the time of the hearing DER had taken no action on the application.

Following discovery proceedings, a hearing was held before Judge McGuire on September 19, 1985. During the course of the hearing, Willowbrook maintained the position that it had acted in good faith when obtaining all permits required by the Commonwealth of Pennsylvania and that it was willing to obtain a surface mining permit. It also vigorously contended that, if Pennsylvania were to deny a permit because one was not necessary and OSMRE were to enforce the NOV, Willowbrook would be forced to restore the disturbed and unpermitted area, and that restoration would result in the violation of its contractual commitments to the surface owners which require Willowbrook to leave a 50-foot-wide road along the rights-of way.

The DER representative who testified at the hearing stated DER's continued position that no permit was required under the surface mining program for construction of a road which would be used for the sole purpose of walking a dragline from one property to another (Tr. 96).

On November 18, 1985, which was subsequent to the hearing, but before Judge McGuire had issued a decision, OSMRE issued an amendment to NOV

No. 85-121-270-02, deleting the first abatement procedure (obtain a surface mining permit), stating that "[p]ermittee must restore the area," and extending the time for abatement to January 17, 1986. The stated reason for the amendment was that "[DER] has not issued the permit which the Permittee has applied for."

On January 7, 1986, DER wrote Willowbrook advising Willowbrook that DER had reviewed the request for a permit amendment but did not intend to process the application "because [DER] does not view the movement of equipment, including draglines, from one site to another, as a mining activity. Therefore no permit from [DER] is necessary." Willowbrook's application was returned with the DER letter. On January 9, 1986, Willowbrook sought temporary relief pursuant to 43 CFR 4.1260. On January 30, 1986, Judge McGuire granted temporary relief through May 1, 1986.

Posthearing briefs were filed on behalf of Willowbrook and OSMRE, and on April 22, 1987, Judge McGuire issued his decision. In his decision Judge McGuire stated that the single issue before him was whether OSMRE had properly issued NOV No. 85-121-270-02. He then found that OSMRE had met its evidentiary duty of justifying the issuance of the NOV (Decision at 6). He noted that OSMRE does not oppose Willowbrook's construction of a road to move the dragline, rather than disassembling it and moving it across existing roads, 5/ but insists that a surface mining permit must be obtained for the construction of the road, as more than 2 acres were disturbed.

Noting the provisions of 25 Pa. Admin. Code | 86.11(c) requiring a permit for coal mining activities in Pennsylvania, and 25 Pa. Admin. Code | 86.143 bond requirements, Judge McGuire relied on the definition of surface mining activities found at 25 Pa. Admin. Code | 86.1 as the basis for the conclusion that the construction of a road between permit sites to move a dragline is an activity which disturbs the land incidental to surface mining operations. 6/ He then found that OSMRE had successfully met its evidentiary burden of establishing a prima facie case as to the validity of the NOV.

Judge McGuire noted Willowbrook's contention that it is caught in a conflict between two regulatory agencies having overlapping jurisdiction regarding the interpretation of the Pennsylvania program. For Willowbrook's contention that OSMRE lacks statutory authority to issue the NOV because

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5/ The cost of disassembly and assembly was estimated to be almost $1 million more than the costs incurred to build the road and move the dragline.

6/ The pertinent part of this code section states that surface mining activities include

> "all activities in which the land surface has been or is disturbed as a result of or incidental to surface mining operations, of the operator, including but not limited to private ways and roads appurtenant to any such area * * * and areas in which facilities, equipment, machines, tools, or other materials or property which result from or are used in, surface mining activities are situated."

Pennsylvania had received primacy in 1982, Judge McGuire found that OSMRE has authority to issue NOV's in states with approved programs when, after an oversight inspection conducted pursuant to 30 U.S.C. | 1271(a)(1) (1982) and 30 CFR 843.12, a 10-day notice is issued and the state fails to take action to ensure that the violative conditions are abated.

Addressing the alternative contention advanced by Willowbrook that, because the Commonwealth had responded to the 10-day notice, OSMRE did not have authority to issue an NOV, and it should not have done so in this case because DER had shown good cause for taking no action when stating that the activity did not require a surface mining permit, Judge McGuire found that the DER response had failed to show good cause for having failed to take the appropriate action to abate Willowbrook's violation. Finally, he dismissed Willowbrook's contention that the proper action for OSMRE to have taken was to seek amendment to the permanent Commonwealth program pursuant to 30 CFR 732.17(e)(3) by stating that Willowbrook had

> presented no evidence of any condition or events which demonstrate that the State program had no longer met the requirements of the act and even in the event that it would have been proper to have done so, it would not have affected OSMRE's authority to issue NOV's under the oversight enforcement authority, which is set forth in section 521(a)(1) of the Act. [Emphasis added.]

(Decision at 8).

Following this conclusion Judge McGuire stated:

> In this factual scenario, DER has challenged [OSMRE's] acknowledged oversight enforcement role in having issued the citation at issue by maintaining that all roads which coal operators construct for the sole purpose of moving surface mining equipment from one surface mining site to another are not required to be permitted. DER has established that policy towards this type of road construction and urges that the use of the road, rather than the size of the disturbance, determines whether [OSMRE] can exercise the oversight enforcement role which Congress has clearly authorized in [30 U.S.C. | 1267 (1982)] and [30 U.S.C. | 1271 (1982)]. Simply stated, DER is in error because that enforcement posture has no support in the wording of the Act nor in its implementing regulations, nor even in those implementing regulations which Pennsylvania has promulgated in connection with its permanent program, which when conditionally approved by the Secretary on July 30, 1982, was required, in accordance with the wording of [30 U.S.C. § 1253(a) (1982)] to have the capability of carrying out the provisions of the Act and meeting its purposes. That statutory requirement will obviously be unfulfilled if DER's position in this matter is adopted. [Footnotes omitted; emphasis added.]

(Decision at 8-9).

Judge McGuire made no mention of the November 18, 1985, amendment to NOV No. 85-121-270-02, which deleted the abatement procedure which would have allowed Willowbrook to abate the NOV by obtaining a surface mining permit, and stated that Willowbrook must restore the disturbed area.

Willowbrook then filed an appeal from Judge McGuire's decision pur-suant to 43 CFR 4.1271. On June 18, 1987, the Pennsylvania Coal Mining Association et al. (the Associations) filed a motion for leave to file a brief as amici curiae. 7/ On July 21, 1987, the Associations were joined as friends of the Board.

[1] During a routine oversight inspection a Federal inspector observed what he perceived to be a violation of the permitting and bonding requirements of the Act. A 10-day notice was issued to DER on April 17, 1985. Following receipt of this notice the Commonwealth regulatory authority responded to the 10-day notice advising OSMRE that it did not consider the action cited in the 10-day notice to be a violation of Pennsylvania surface mining laws and regulations because the Commonwealth did not consider the construction of a road to move a dragline from one permitted site to another to be a surface mining activity. The first issue in this case is whether the construction of the road to move a dragline from one permitted area to another is a surface mining activity under the Act and Pennsylvania law.

OSMRE contends and Judge McGuire found that Willowbrook violated 25 Pa. Admin. Code || 86.11 and 86.143(b) as well as section 502 of the Act and 30 CFR 773.11 when constructing the dragline road without first having obtained a surface mining permit from DER. The applicable provisions of
25 Pa. Admin. Code provide:

> | 86.11 General Requirements.
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> (a) No person shall operate a mine or allow discharge from a mine into the waters of the Commonwealth unless such person has first obtained a permit from the Department.
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> (b) Permits shall be issued only to an operator.
>
> (c) [N]o person shall engage in or carry out coal mining activities within Pennsylvania unless that person has first obtained a valid permit issued by the Department.
>
> | 86.143 Requirements to file a bond.
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> * * * * * * *

7/ The Ohio Mining and Reclamation Association, the Ohio Coal and Energy Association, Facts About Coal In Tennessee, Knott Letcher Perry Independent Coal Operators Association, the Indiana Coal Council, the Illinois Coal Association, and the Kentucky Coal Association joined the Pennsylvania Coal Mining association as amici curiae.

> (b) An operator shall not disturb surface acreage * * * prior to receipt of approval from the Department of a bond and issuance of a permit or incremental phase approval covering the surface acreage to be affected.

In addition the following provisions of the same Code section are applicable:

> | 86.1 Definitions.
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> * * * * * * *
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> Operator -- A person * * * engaged in coal mining activities as a principal as distinguished from an agent or independent contractor.
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> * * * * * * *
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> Surface Mining Activities -- An operation whereby coal is extracted from the earth * * * by removing the strata * * * and retrieving the coal from the surface * * * including but not limited to * * * site preparation, entry, * * * and construction and activities related thereto * * *. Surface mining activities shall include all activities in which the land surface has been or is disturbed as a result of or incidental to surface mining operations of the operator, including but not limited to private ways * * *.

As can be seen, under the laws of the Commonwealth of Pennsylvania, no person may engage in or carry out coal mining activities within that Commonwealth without first obtaining a valid permit issued by DER. There can be no question that Willowbrook was an operator carrying out coal mining activities and those activities fall within the definition of surface mining. This being the case, we must now determine whether Willowbrook was an operator carrying out surface mining activities when it constructed the road to move its dragline from one mine site to another.

The road clearly falls within the definition of surface mining, in one if not two ways. First, the road construction was used by Willowbrook as a means of gaining entry to the mine for the dragline. Second, the sole purpose of the road was to allow the operator to move mining equipment from a site at which it was used for surface mining to another site at which it would again be used for surface mining. It clearly was not a public road and thus must be deemed to be a private way incidental to Willowbrook's mining activity. We find that the construction of the road was a surface mining activity which required a permit under SMCRA.

[2] Having determined that the activity was within the ambit of SMCRA, we will address the propriety of the action taken by OSMRE. There is no question regarding OSMRE's authority to issue the 10-day notice. That action was taken pursuant to 30 U.S.C. | 1271(a)(1) (1982), which provides,

in part, that "[w]henever * * * the Secretary has reason to believe that any person is in violation of any requirement of [SMCRA] * * * the Secretary shall notify the State regulatory authority * * * in the State in which such violation exists."

Based upon evidence of there having been surface mining activity causing a surface disturbance in an area not covered by a permit, OSMRE issued a 10-day notice to DER. In response to this notice, DER advised OSMRE that it was taking no action to cause said violation to be abated because DER did not consider construction of a road to move a dragline from one mine drainage permit to another to be surface mining or a related activity, and thus it was not required that the road be permitted or bonded by DER. However, as we previously have noted, Willowbrook was carrying out surface mining activities when constructing the private way to be used to move its dragline from one mine site to another. The interpretation of the statute advanced by DER was contrary to both the intent of SMCRA and a reasonable interpretation of the Pennsylvania law.

Following receipt of DER's response to the 10-day notice OSMRE ordered a Federal inspection resulting in the issuance of a notice of violation.

> The statute quoted above, 30 U.S.C. | 1271(a)(1) (1982), also provides:
> If * * * the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such fail-
> ure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring * * *.

After determining that DER's response to the 10-day notice did not show good cause for DER's failure to take action, OSMRE ordered an inspection of the site of the road construction. Following this inspection the OSMRE inspector issued the NOV pursuant to 30 CFR 843.12(a)(2). See Peabody Coal Co. v. OSMRE, 95 IBLA 204, 210-11, 94 I.D. 12, 16 (1987); Bannock Coal Co. v. OSMRE, 93 IBLA 225, 234-35 (1986); Turner Brothers, Inc. v. OSMRE, 92 IBLA 320, 325 (1986).

[3] We will now examine the status of the case following issuance of the NOV to determine whether additional action should have been taken by one or more of the parties. As previously discussed, when OSMRE has reason to believe that there has been an infraction of SMCRA or comparable state laws enacted by a state which has been granted primacy, OSMRE has the authority to issue a 10-day notice to the state directing the state to investigate the matter and determine if a violation of the applicable laws or regulations exists. When the state conducts this investigation and responds to the 10-day notice OSMRE will determine whether the state's response is appropriate, under the circumstances of the particular case. When OSMRE properly determines that the state response is inappropriate, OSMRE is obligated to

take action by undertaking a Federal inspection and, if appropriate, issuing an NOV or, if appropriate, a cessation order. The requirement for action is dependent upon the facts of the particular case.

In the case now before us, Willowbrook's failure which led to the 10-day notice and to the subsequent Federal inspection was its failure to obtain a surface mining permit prior to constructing an access way used in conjunction with its mining operations. The authority (and responsibility) for issuing this permit was vested in the Commonwealth of Pennsylvania. Thus, the NOV subsequently issued by OSMRE properly directed Willowbrook to either obtain the permit or reclaim the affected lands. It is clear that the abatement requirements set out in the NOV were both reasonable and proper.

The first alternative afforded Willowbrook was to place itself in compliance with SMCRA by obtaining the surface mining permit (and related bond) it should have obtained in the first place. The second alternative afforded Willowbrook was to restore the lands to the condition existing prior to the undertaking in violation of the applicable laws; i.e., to return to the status existing prior to the time Willowbrook had violated
the law. However, Willowbrook was frustrated in its attempt to comply with the law. This frustration was a direct result of DER's refusal to issue the necessary permit amendment. Significantly, Willowbrook was also frustrated by OSMRE's refusal to take the action necessary to permit Willowbrook to comply with the directive in the NOV and the provisions of SMCRA, as we explain below.

During the course of the proceedings now before us no party has ever advanced the argument that construction of a way for the purpose of moving
a dragline from one property to another should be strictly prohibited. Nor do we find anything in SMCRA, the regulations promulgated by OSMRE, or the Pennsylvania laws that can be construed as prohibiting this activity. However, as it now stands, a surface mining permit is required under SMCRA, and the Commonwealth of Pennsylvania will not issue one. The construction of a way for the purpose of moving a dragline is a prohibited act. In effect, the inaction of the regulatory authorities has rendered a regulated action
a prohibited action. 8/

As noted by Judge McGuire,

> [DER's] enforcement posture has no support in the wording of the Act nor in its implementing regulations, nor even in those implementing regulations which Pennsylvania has promulgated in connection with its permanent program, which when conditionally approved

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8/ It is important to keep in mind that, except as specifically otherwise provided, it was the clear intent of Congress that surface mining activi-ties should be regulated. When the failure to carry out the regulatory provisions of the Act result in the prohibition of mining activities, the intent of Congress is frustrated.

> by the Secretary on July 30, 1982, was required, in accordance with the wording of [30 U.S.C. | 1253(a) (1982)] to have the capability of carrying out the provisions of the Act and meeting its purposes. That statutory requirement will obviously be unfulfilled if DER's position in this matter is adopted. [Footnotes omitted.]

(Decision at 8-9). We have no argument with this statement. There is ample evidence that the Pennsylvania program was not being carried out in a manner which meets the requirements of SMCRA. DER was not requiring an operator to obtain a surface mining permit (and concordant bond) prior to constructing a private way for the purpose of moving a dragline from one permit area to another.

During the course of the hearing Willowbrook submitted evidence and testimony that it had commenced abatement of the NOV by preparing and filing an application for amendment of its existing permit to include the lands in the area of the private way. Additional evidence in the form of testimony by the DER official responsible for review and issuance of surface mining permits supported Willowbrook's statement that it had filed its application for a permit covering the lands in question. There is no question that Willowbrook's effort to abate the NOV by obtaining a surface mining permit was being frustrated by DER's refusal to process that application.

It is obvious that if DER had issued the surface mining permit at any time prior to Judge McGuire's decision, the outcome of that decision and the case now before us would be much different than it now is. How-ever, subsequent to the hearing and prior to the time Judge McGuire issued his decision OSMRE unilaterally rendered the action previously taken by Willowbrook meaningless. On November 18, 1985, OSMRE issued an amendment to NOV No. 85-121-270-02, deleting the proviso that abatement could be achieved by obtaining a permit, and making restoration of the area the only course of action available to Willowbrook. 9/ The stated reason for issuing this amendment was that "[DER] has not issued the permit the Permittee has applied for (as required by step 2 of the Abatement)."

We view OSMRE's amendment of the NOV as an acknowledgement that DER remained steadfast in its refusal to issue surface mining permits for construction of private ways used for moving draglines from one permit area to another. It is clear that OSMRE was fully aware that in the Commonwealth of Pennsylvania an operator could not gain a surface mining permit for the construction of such a private way, could not construct one without a surface mining permit, and was thus prohibited by law from using a private way to move a dragline from one permit area to another.

9/ There is nothing in the record that would indicate that OSMRE ever sought leave to take this action or even informed Judge McGuire of its intent to do so in advance of serving the amendment on Willowbrook.

If we were to merely affirm Judge McGuire's decision as it now stands, such affirmation would have an adverse impact on surface mining operations in the Commonwealth of Pennsylvania which we find to be contrary to the intent of Congress when enacting SMCRA. When enacting section 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982), Congress did more than give the Secretary a vehicle for ensuring that a state will enforce a state program. The wording of that section leaves little doubt that it was the intent of Congress that the Secretary was required to do so. Congress provided:

> Whenever * * * the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall, after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice * * * the Secretary shall * * * issue new or revised permits in accordance with the requirements of this chapter * * *. [Emphasis added.]

Again, as noted by Judge McGuire, the statutory requirement that a state with an approved plan was to carry out the provisions of SMCRA will obviously be unfulfilled if OSMRE is to allow DER to maintain its present position. There can be no doubt that OSMRE knew that DER did not intend to enforce SMCRA with respect to private ways constructed by an operator within the state. When OSMRE failed to take the action necessary to ensure that the applicable provisions of SMCRA would be enforced by DER by taking a course of action which rendered it impossible for an operator to move a dragline from one permitted area to another (unless the permitted areas happened to abut), OSMRE violated the provisions of 30 U.S.C | 1271(b) (1982), which provides that such action shall be taken. 10/

Having reached this conclusion we find it appropriate to note that it is not our intent to require that the action called for in this decision be invoked on each occasion that OSMRE finds the state response to a 10-day notice to be inadequate. On the contrary, the fact that there have been a number of previous cases in which this Board has not found it necessary to examine the question of when the provisions of 30 U.S.C. | 1271(b) (1982)

10/ Our review of the legislative history of this section discloses that, as originally written, SMCRA had provided for an immediate assumption of the regulatory responsibility when the Secretary had knowledge that a state could not or did not intend to enforce the Act. The language providing for notice and a hearing was subsequently added.

are to be invoked clearly demonstrates that the use of a 10-day notice followed by a Federal inspection will alone achieve the desired result in the vast majority of the cases. 11/

The facts that distinguish this case should be obvious. Willowbrook had, on at least one prior occasion, sought a surface permit for constructing a private way to move a dragline. Had DER issued the permit at that time, Willowbrook would have sought a permit for the private way now in issue. However, for whatever reason, DER made the determination that a permit was not necessary. Following the issuance of the NOV, Willowbrook again sought a permit. Again, DER frustrated Willowbrook's efforts to gain compliance by refusing to process Willowbrook's permit application. At the hearing, DER again stated its intent to not process Willowbrook's application or issue a permit. Finally, on or about November 18, 1985, OSMRE concluded that the normal procedure (10-day notice followed by inspection and issuance of an NOV) would not result in DER's issuance of the permit called for in NOV. Rather than amending the NOV to preclude any possibility that Willowbrook could obtain a permit, OSMRE should have taken action to ensure that Willowbrook would, at the very least, be afforded an opportunity to obtain the permit. Willowbrook was precluded from gaining compliance with the Act by DER's refusal to act.

The holding in this case should be narrowly construed to require OSMRE action pursuant to 30 U.S.C. | 1271(b) (1982) when it becomes evident that the state has adopted a policy of inaction which precludes compliance with SMCRA. 12/ In the other cases reviewed by the Board, the operator could achieve compliance without action on the part of the state. 13/

We find that Willowbrook has shown by a preponderance of the evidence that, by its refusal to act upon Willowbrook's application for an amendment to its surface mining permit, the State was no longer meeting the requirements of SMCRA. We are therefore modifying Judge McGuire's decision in the following manner: (1) no authority was sought or gained for the November 18, 1985, amendment to the NOV and therefore that amendment is vacated to the extent that it had precluded abatement by obtaining a sur-face mining permit (see Apache Coal Co., 1 IBSMA 14, 85 I.D. 395 (1978)); (2) Willowbrook shall be afforded an opportunity to reapply for an amend-ment of its surface mining permit, which should be filed with DER; and (3) in the event Willowbrook files an application, OSMRE is directed to take such action as is necessary to cause the permit to be acted upon, and issued

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11/ See, e.g., Turner Brothers, Inc. v. OSMRE, 101 IBLA 84 (1988); Dora Mining Co. v. OSMRE, 100 IBLA 300 (1987); Bannock Coal Co. v. OSMRE, 93 IBLA 225 (1986); Turner Brothers, Inc. v. OSMRE, 92 IBLA 320 (1986).

12/ Nor does it preclude action under 30 CFR 732.17, when applicable.

13/ For example, in Peabody Coal Co. v. OSMRE, 101 IBLA 167 (1988), arguments were advanced on appeal which were similar to those presented herein. However, Peabody can be readily distinguished from this case because no state action was necessary for Peabody to change its blasting procedure in order to achieve compliance with SMCRA.

if the permitting requirements are met including, if necessary, action pursuant to 30 U.S.C | 1271(b) (1982). In all respects not inconsistent herewith, Judge McGuires's decision is affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge